IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 4257 of 2004

WITH

CRIMINAL MISC. APPLICATION NO.4258 OF 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE MD SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PRASUN SARABHAI SHAH - Applicant(s)
Versus
STITCHMAN SERVICES A PARTNERSHIP FIRM THRO & 1 – Respondent(s)

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Appearance :
MR TV SHAH for Petitioner(s) : 1,
MR TS NANAVATI for Respondent(s) : 1,
MR PD BHATE APP for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE MD SHAH

Date : 24/03/2006

COMMON CAV JUDGMENT :

1. Rule. By way of these petitions under Section 482 of the Code of Criminal Procedure, the petitioner has prayed to quash and set aside the orders passed by the learned Metropolitan Magistrate, Court No.9, Ahmedabad, in Criminal Case No.462 of 1999 and 463 of 1999 issuing the process on the accused and also quash and set aside all other proceedings carried out in these complaints.

2. Brief facts of the case in Criminal Misc. Application No.4257 of 2004 are such that the complainant had supplied Sewing machines to Saujanvi Exporters Pvt. Ltd. for a total value of Rs.3,53,533/- and for which the company has issued 5 cheques drawn on Dena Bank, Overseas Business Branch, Ahmedabad bearing Nos.919454 to 919458 all of dated 9-11-98, which were signed by the petitioner-accused as the Director of the company. The said cheques were deposited by the complainant on 10-11-98 in its account, but they were bounced with an endorsement “referred to drawer”. Therefore, the complainant issued statutory notice under Section 138 of the Negotiable Instruments Act (“the Act” for short) to the petitioner on 17-11-98. It is the say of the complainant that after receiving the said notice,

the accused-petitioner assured the complainant that he will make arrangement of amount in his bank account and will inform the complainant. After receiving instruction on telephone from the petitioner, the complainant re-deposited the above mentioned five cheques. Again the said cheques were returned because of insufficient funds in the account of the petitioner and respondent No.1-complainant received the bankers memo on or about 14-12-98. Therefore, the complainant issued second notice under Section 138 of the Act to the petitioner-accused on 18-12-98. The petitioner replied the said notice and not complied with the notice. Therefore, on 2-2-99, the complainant-respondent No.1 had lodged a complaint under Section 138 of the Act before the learned Metropolitan Magistrate, Court No.9, Ahmedabad and after verifying the complaint, the learned Metropolitan Magistrate, Court No.9, Ahmedabad has issued summons to the accused.

In Criminal Misc. Application No.4258 of 2004, case of the complainant is such that he had supplied Sewing machines to Saujanvi Exporters Pvt. Ltd. for a total value of Rs.3,53,533/- and for which the company has issued 5 cheques drawn on Dena Bank, Overseas Business Branch, Ahmedabad bearing Nos.919454 to 919458 all of dated 9-11-99, which were signed by the petitioner-

accused as the Director of the company. The said cheques were deposited by the complainant on 10-11-99 in its account, but they were bounced with an endorsement “referred to drawer”. Therefore, the complainant issued statutory notice under Section 138 of the Negotiable Instruments Act (“the Act” for short) to the petitioner on 17-11-99. It is the say of the complainant that after receiving the said notice, the accused-petitioner assured the complainant that he will make arrangement of amount in his bank account and will inform the complainant. After receiving instruction on telephone from the petitioner, the complainant re-deposited the above mentioned five cheques. Again the said cheques were returned because of insufficient funds in the account of the petitioner and respondent No.1-complainant received the bankers memo on or about 14-12-99. Therefore, the complainant issued second notice under Section 138 of the Act to the petitioner-accused on 18-12-99. The petitioner replied the said notice and not complied with the notice. Therefore, on 2-2-2000, the complainant-respondent No.1 had lodged a complaint under Section 138 of the Act before the learned Metropolitan Magistrate, Court No.9, Ahmedabad and after verifying the complaint, the learned Metropolitan Magistrate, Court No.9, Ahmedabad has issued

summons to the accused.

3. As the facts as well as controversy involved in both the petitions are identical, they are disposed of by this common judgment.

4. Thereafter, the petitioner submitted applications in both the criminal cases for dropping the proceeding which were rejected by the learned Metropolitan Magistrate, Court No.3, Ahmedabad vide order 29-11-2002. Thereafter, the petitioners have filed these petitions and prayed to quash and set aside the order passed by the learned Metropolitan Magistrate, Court No.9, Ahmedabad, in Criminal Case No.462 of 1999 and 463 of 1999 issuing the process on the accused and also quash and set aside all other proceedings carried out in these complaints.

5. Heard learned advocates appearing for the respective parties.

6. Mr. T.U.Shah, learned advocate for the petitioner has argued that the goods were sold by the complainant to Saujanvi Exporters Pvt. Ltd. The cheques were also issued by the said Saujanvi Exporters Pvt. Ltd, which were signed by the petitioner as Director of the said company and the complaint is not filed against the said Saujanvi Exporters Pvt. Ltd. who is the drawer of the cheques, but it is filed only against one of its Directors Shri Prasun

Sarabhai Shah, present petitioner. Thus, without filing the complaint against the drawer of the cheques namely Saujanvi Exporters Pvt. Ltd, the complaint under Section 138 of the Act only against the Director is not maintainable. He has further argued that undisputedly the notice of demand due to the bouncing of the cheques was issued on the complainant by the accused on 17-11-98 demanding to make the payment within 15 days. The said period of 15 days was over on 1-12-98. Therefore, on that day the cause of action had arisen against the accused. As per the provisions of the Act, the complainant ought to have filed the complaint within 30 days from the date of cause of action. Therefore, the complaint was required to be filed on or before 1-1-99 and thereafter, it became time-barred. The re-deposit of the cheques and the issuance of the second notice have no meaning whatsoever so long as the provisions of Sections 138 and 142 of the Act are concerned. He has further argued that undisputedly the complaint was filed on 2-2-99, hence, it is time barred. Therefore, no cognizance could have been taken by the learned Metropolitan Magistrate and no order can be passed issuing process against the petitioner and the complaint which is time-barred at the time of presentation, is required to be quashed. In support of

his arguments, he has placed reliance on the decisions reported in **JT 1998 (6) SC 48 Sadanandan Bhardan V. Madhavan Sunil Kumar** wherein the Honble Apex Court has held as under :

> *Section 138 does not put any embargo upon the payee to successively present a dishonoured cheque during the period of its validity. This apart, in course of business transaction it is not uncommon for a cheque being returned due to insufficient funds or similar such reason and being presented again by the payee after some time, on his own volition or at the request of the drawer, in expectation that it would be encahsed. A cheque can be presented any number of time during the period of its validity.*

In the said decision, in paragraph 10, the Hon'ble Apex Court has further held as under:

> *"10. Now, the question is how the apparently conflicting provisions of the Act, one enabling the payee to repeatedly present the cheque and the other giving him only one opportunity to file a complaint for its dishonour, and that too within one month from the date the cause of action arises, can be reconciled. Having given our anxious consideration to this question, we are of the opinion that the above two provisions can be harmonised, with the interpretation that on each presentation of the cheque and its dishonour a fresh right- and not cause of action- accrues in his favour. He may, therefore, without taking pre-emptory action in*

exerciseof his such right under clause (b) of Section 138, go on presenting the cheques so as to enable him to exercise such right at any point of time during the validity of the cheque. But, once he gives a notice under clause (b) of Section 138 he forfeits such right for in case of failure of the drawer to pay the money within the stipulated time he would be liable for the offence and the cause of action for filing the complaint will arise. Needless to say, the period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of fifteen days from the date of the receipt of the notice by the drawer, expires.

7. The above ratio laid down by the Hon'ble Apex Court is followed by this Court in the decisions reported in **1999 (2) G.L.H. 825 Pruthvish B. Dave v. State of Gujarat & Anr. and 2001 (2) G.L.H. 580 Vasantkumar A. Shah v. State of Gujarat.**

8. On the other hand, learned advocate Mr. Nanavati has argued that even if on the first occasion once the bank returns the cheque with an endorsement " refer to drawer", the drawee is still legally entitled to once again deposit the very same cheque before the bank more particularly when he was so assured by the drawer of the cheque that the due amount will be deposited in the bank in few days and that the said cheque thereafter on second

presentation would be honoured. In support of his contention, he has placed reliance on a decision reported in **1997 (2) GLR 1191 Dipendra G. Choksi & Anr. V Dipak Chimanlal Patel**. However, this decision will not apply to the facts of the present case in view of the ratio laid down by our own High Court as well as the Hon'ble Apex Court in the following decisions (i) 1999 (2) G.L.H. 825 Pruthvish B. Dave v. State of Gujarat & Anr. (ii) 2001 (2) G.L.H. 580 Vasantkumar A. Shah v. State of Gujarat, (iii) JT 1998 (6) SC, Sadanandan Bhadran v. Madhavan Sunil Kumar and (iv) 2005 SCC (Cri.) 1153 Prem Chand Vijay Kumar vs. Yashpal Singh and others.

9. Mr. Nanavati has also placed reliance on a decision reported in **(2001) 6 SCC 463, Dalmia Cement (Bharat) Ltd. vs. Galaxy Traders & Agencies Ltd., 1999,** where the facts reveal that initially an empty envelope without any contents thereof was served to the drawer, and therefore, the drawer had sought for issuance of the notice with contents, if any, and only upon service of the second notice with contents it can be said that a statutory notice has been issued to the drawer and accordingly the period of limitation commenced from the date of service of the second notice. That is not so in the present case. In that view of the matter, the said decision upon which

reliance has been placed by learned counsel for the respondent No.1 cannot be helpful to him.

10. Mr. Nanavati has vehemently argued that if the Court comes to the conclusion that the complaint is time barred, then alternatively he submitted that the Court can issue process under Section 406 and 420 of the IPC if prima facie case for the said offence ahs been made out by the complainant in the complaint. This argument is not acceptable in light of decision of the Apex Court in the case of **G. Sagar Suri & Anr. v. State of UP and Others,** reported in **2000 (2) GLH 191.**

11. Considering the rival submissions, it is crystal clear that the cheques were issued by the petitioner's company on 9-11-98. The said cheques were deposited on 10-11-98, but were dishonoured. First notice under Section 138 of the Act was issued on 17-11-98. Under Section 142 (C) of the Negotiable Instruments Act, complaint was required to be made within one month from the date on which the cause of action arise. In light of the provisions of Section 142 (C) of the Negotiable Instruments Act, the complainant ought to have file the complaint within 15 days of the receipt of service of the notice. The cheques in question were again deposited in the bank and dishonoured and again notice was issued

to the petitioner after the period of expiry of notice period, the complaint was filed on 2-2-99. It is an admitted fact that the cheques were presented twice and on both the occasions, notices were served on the petitioner in time, but in light of the provisions of Section 138 read with Section 142 of the Act, the cause of action arise only once when first notice is given. The second presentation of cheque or service of notice cannot revive the cause of action which has already expired due to afflux of time in light of the provisions of Negotiable Instrument Act. Only one fact will give rise to the cause of action and that is the failure to make payment within 15 days from the date on which notice is received by the drawer. Second presentation and second issuance of second notice will not retrive the cause of action if has already expired. Nor does it give a second/fresh cause of action.

12. In view of the aforesaid discussion, I am of the view that the findings of the trial Court are not legal, just and proper and it require interference. Therefore, the orders passed by the trial Court in Criminal Case No.462 of 1999 and 463 of 1999 issuing process against the petitioner are hereby quashed and set aside. The impugned complaints which have been filed under Sections

138 of the Negotiable Instrument Act against the petitioner, being Criminal Case No.462 of 1999 and 463 of 1999 are hereby quashed. Rule is made absolute in both the petitions with no order as to costs.

(M.D.SHAH, J.)

*mithabhai